

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 32 OF 2015

BETWEEN:

IRENE BOWEN

Employee

and

THE BOARD OF TRUSTEES SUNNYSIDE TUTORIAL SCHOOL

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. St. Lawrence de Freitas

Member

Appearances:

Mr. Anderson E. Carty of Antigua & Barbuda Tradesman & United Workers' Federation, Representative for the Employee

Ms. Rhodsha A. Oliver of Roberts & Co., Attorney-at-Law for the Employer

2016: September 19
October 21

JUDGMENT

Brown, P:

Background Facts

1. The Employee commenced her employment with the Employer in September 1999 after retiring at age 60 as a Principal Primary School Teacher in the Government Service. Her last salary while employed by the Employer up to August 31, 2014, was \$3,000.00 per month.
2. Save for one letter in 2007, notifying her of an increase in salary, the Employee received no written statement of her working conditions as required under section C 5 of the Antigua and Barbuda Labour Code (the Labour Code) at the commencement of or at any subsequent date during her employment.

3. The Employer had no mandatory retirement age and communicated no policy to the Employee regarding the timing, procedure or any other conditions precedent for her retirement. One teacher was employed by the Employer up to the age of 80 years.
4. In or about 2009 after completing 10 years of service, following consultation between the parties, the Employee was transferred from her position as a Grade IV Teacher to the Employer's Preschool Division. At the time of "negotiating" the transfer the Employer through its then Chairman, "mooted" an optional ex gratia payment in the sum of \$10,000.00 to the Employee as an alternative in the event that she declined the transfer and opted to retire at that time.
5. The Employee declined to retire and receive the said ex gratia payment of \$10,000.00. Instead, she accepted the transfer to the Preschool Division where she worked for the ensuing five (5) years.
6. During the said ensuring period of five (5) years, the Employer wrote to the Employee four letters dated September 4, 2009, September 30, 2009, December 1, 2012 and May 21, 2014 expressing its concerns in respect of complaints of parents and/or other teachers regarding:
 - (a) the Employee's tendency to sleep on the job in the classroom;
 - (b) the Employee's lack of participation in the "assembly" at the start of the school day;
 - (c) the Employee's tendency to hit, punch or otherwise punish her students.
7. In each case of complaint the Employer threatened the Employee with "appropriate action"; warned her to conduct herself in a "responsible manner"; advised her that the complaint against her would be "placed on her file"; and that the matter would be "reported to the Board of Trustees for action to be taken against (her)".
8. Between September 2009 and May 2014, when the letters of reprimand were written to the Employee, the Employer took no other disciplinary action against her in respect of her performance, conduct, capability, illness or other reasons which potentially threatened to jeopardize her employment.
9. During the said period between September 2009 and May 2014, the Employee on more than one occasion, orally expressed her view to the then Principal, Mr. Howard Warner, that perhaps the time was right for her to retire. She gave no definite date for retirement and did not formally advise the Employer of her intention to retire or a date on which she would do so.

10. During the said period between September 2009 and May 2014, the Employer did not formally or informally indicate to the Employee its position regarding her retirement or any precondition or procedure which she would be required adopt or follow having regard to her orally expressed thought that perhaps the time was right for her to retire .
11. The Employee was invited by the Employer to a meeting held on July 3, 2014 at which the Employer sought to ascertain the Employee's intention about returning to work and her availability for the then impending new term. In response, the Employee stated that she was thinking of working another year but repeated her view that it was probably time for her to retire. The Employee gave no date of her intended retirement. The Employer gave no indications of the procedures and formalities which the Employee would have to follow or discharge towards her retirement.
12. "After the meeting the Employee returned to her class and there was no further discussions on the matter."
13. By letter dated August 27, 2014 the Employer wrote to the Employee reminding her of an alleged agreement between them that she "would go on retirement from August 31, 2014." The full text of the letter is as follows:

"Sunnyside Tutorial School

August 27, 2014

**Mrs Irene Bowen
Sunnyside Tutorial School**

Dear Mrs Bowen,

I refer to your meeting with the Board on Wednesday, July 3, 2014 concerning your retirement. You will remember that at that meeting we agreed that you would go on retirement from August 31, 2014.

I take this opportunity of expressing our heartfelt thanks for your exemplary service to the School. You will be greatly missed.

On behalf of the Board of Trustees, I wish you good health, long life and a most enjoyable and well deserved retirement.

Sincerely,

.....
Sir Clare K Roberts QC
Chairman, Board of Trustees"

14. By Reference filed on May 26, 2015 the Employee commenced these proceedings contending that she was unfairly dismissed.

The Employee's Case

15. In relation to contentious matters, by her Memorandum of Claim filed on June 19, 2015, the Employee contended as follows:

- On July 3, 2015 she was invited by the Employer to a meeting at which she was told by the Employer's Chairman in the presence of the Principal that her employment would be terminated because of her age. She was not given an effective date of her termination.
- The Employer wrote to her by letter dated August 27, 2014 thanking her for her exemplary service. The letter gave the Employee only three (3) days' notice of the effective date of the termination of her services.
- In the absence of a statutory retirement age, the age at which an Employee should retire must be established by the Employer's policy or by agreement between the parties.
- The Employee had no agreement with the Employer that she would retire on August 31, 2014.
- The Employee was unfairly dismissed and is entitled to compensation.

The Employer's Case

16. In its Memorandum of Defence the Employer pleaded as follows in relation to the contentious matters:

- The Employer denied that its Chairman told the Employee that her employment would be terminated because of her age.
- Having stated that she contemplated retirement, the Employee retired voluntarily.
- The Employee knew or ought to have known that there would be no benefits on retirement.
- The letter dated August 27, 2014 was a farewell letter to the Employee and was written out of courtesy. It was not intended to give the

Employee notice of the Employer's decision to terminate her employment. It was evidence of the agreed retirement.

- The Employer denied making a unilateral decision to retire the Employee. It was the Employee's decision to retire on August 31, 2014 to which the Employer acceded.

The Main Issues

17. In so far as questions arise on matters of fact and/or law, the main issues for determination are:-

- (1) Whether the Employee agreed with the Employer to retire from teaching on August 31, 2016.
- (2) Whether the Employee was unfairly dismissed.
- (3) Whether the Employee received reasonable notice of the Employer's desire for her retirement to take effect on August 31, 2014.
- (4) Whether the Employee is entitled to compensation for the termination of her services on the ground of retirement without reasonable notice.

The Evidence

18. The Employee's Witness Statement filed on August 5, 2015 was admitted into evidence and supplemented by her oral testimony.

19. At the onset of her testimony her representative informed the Court of the Employee's apparent loss of memory and requested that the Court and Counsel for the Employer exercise appropriate patience and understanding.

20. In so far as the accuracy of some parts of her testimony were challenged by the Employer, we find that, these aspects apart, the main thrust of her testimony was logical and consistent with the background facts as substantially outlined at paragraphs 1 to 13 above. Accordingly, we summarize salient parts of her testimony as follows:

- Over the five year period between 2009 and 2014, the Employee was acutely aware that the Employer had no mandatory retirement age. In that regard, she was mindful that one teacher, Ms. Southwell, continued her employment with the Employer as a School Teacher until she was eighty (80) years old.
- At a meeting convened by the Employer on July 3, 2014 **"I was told by the Chairman that my employment would be terminated because of my age... I did not see that I had any choice in the matter. No option was offered to me. I was simply told that my employment would come to an end because**

of my age but I was never actually told at what date termination would be effective or what benefits I would receive."

- The Employee continued that **"I view that my Employer's action was discriminating, as no medical evaluation procedure had been used to determine my continued fitness, or otherwise, to continue to perform my duties satisfactorily"**.
- Referring to the Employer's letter dated August 27, 2014, the Employee said, **"I did not request to go on retirement and neither did I enter into any mutual agreement to voluntarily quit my job from August 31, 2014. Such a decision was unilaterally taken by the Board's Chairman, without any discussion or negotiation with me. I was simply called to a meeting and was told of the Board's decision. I did not have a choice in the matter."**

21. Mr. Howard Warner, former Principal of the Employer's school and Mr. Gene Small, the President of the Parent Teachers Association Executive and member of the Board of Trustees, testified on behalf of the Employer. Their Witness Statements filed on August 5, 2015 were duly admitted into evidence and supplemented by the oral testimony. We found both of these witnesses to be generally honest and credible.

22. It is instructive to note Mr. Warner's testimony as stated at the following paragraphs of his Witness Statement:

"2.As to my own knowledge of the school's policy in matters of employing such persons, there is no mandatory retirement age in place to suggest when persons employed under those circumstances should be retired or required to resign."

23. Further, Mr. Warner testified at paragraph 5 of his witness statement that he brought several complaints to the attention of the Employee and that

"5. On each occasion, the Employee indicated that the older children at the school posed a challenge as she was advancing in age. She also indicated that she was giving consideration to retiring but promised to be more vigilant while she continued her employment at the School."

24. In addition at paragraph 7 of his Witness Statement Mr. Warner stated:

"7. During the school summer holidays in 2009, I learnt at a meeting with the Chairman, Dame Bridget Harris, that there was a possibility that the Employee would have been retiring shortly. Subsequently, I was informed that the Employee had made a decision to continue teaching at the school."

25. Moreover, Mr. Warner stated at paragraph 8 of his Witness Statement:

"8. In view of the Employee's own admission that she was unable to cope with the Grade 4 class on account of her feebleness brought about by her age, I thought about transferring the Employee to another class - a less stressful teaching environment. This was also suggested to me by the Chairman who had held previous discussions with the Employee. Incidentally, there was an opening in the preschool section due to a reshuffling of staff members following two resignations. That position for a preschool teacher had to be filled for the new academic year. In the circumstances, the Employee was transferred to the preschool section."

26. Mr. Warner continued at paragraph 12 of his Witness Statement:

"12. In early 2014, I was still receiving reports of the Employee hitting and pinching children in her class with the result that I approached the Employee and spoke to her on several occasions. I begged the Employee to refrain from these actions particularly as parents were threatening to remove their children from the school. The Employee indicated that perhaps it was time for her to give up teaching and go home."

27. Mr. Warner further stated at paragraphs 14, 15, 16, 17 and 21 of his Witness Statement:

"14. I recall that each time I had a discussion with the Employee concerning her actions, the Employee stated that she was not as active as she was before and often times gave the impression that she was considering going home on retirement due to her inability to cope."

"15. On July 3, 2014 following discussions at a Board meeting, I called the Employee and invited her to a meeting with the Board of Trustees. At this meeting, the Employee unequivocally stated that at first she was thinking of another year but that the Lord had told her that it was time to go. The Employee even made reference to a scripture from the Bible."

"16. Having listened to the Employee, it was my understanding at that time, that she decided of her own volition to go on retirement and terminate her employment with the School. It was no surprise to me that she had done so judging from her remarks in our conversations. The Chairman of the Board, Sir Clare Roberts, did not terminate the Employee nor did he give the Employee the impression that she did not have a choice to remain at the school."

"17. After the meeting, the Employee returned to her class and there were no further discussions on the matter."

"21. The Employee's assertion that she was dismissed is disingenuous. The Employee made her decision in my presence and other members of the Board and spoke with clarity and certainty."

28. Under Cross Examination, Mr. Warner testified that the basis for inviting the Employee to the meeting on July 3, 2014 was her repeated comments about retiring. In particular he said that the Chairman asked her age and how she was feeling about her employment. He said that the Chairman brought up the issue of retirement to the Employee. Although he couldn't remember her response, Mr. Warner said that he formed the view that the Employee was not coming back to teach.
29. Under Cross Examination Mr. Warner continued that although the Employee voluntarily decided to retire, he did not know when her last "working" day was. He said it was clear to him that the Employee was leaving but he did not know when. Further, he said that it was clear to him that she was retiring soon.
30. In response to a question put to him by the Court, as to whether a date of retirement was fixed and agreed between the Employer and the Employee at the meeting on July 3, 2014, Mr. Warner said: **"I don't think it was stated. There was no agreement for the Employee to go on retirement from August 31, 2014."**
31. For his part Mr. Small testified under cross examination that: **"Nobody indicated that the Employee had made a request to retire. As a member of the Board I don't recall such a request by the Employee... I do not recall Mrs. Bowen saying she wants to retire. I got the impression that they were making plans and that she had made indication orally, before the meeting, to retire. "**
32. Mr. Small continued: **"The question was whether to retire or if she wanted to continue. I don't recall that she had a choice to continue or retire. My recollection is that she agreed. The discussion was not framed as if she had a choice. I left the meeting feeling that she had agreed that it was time to retire...There was not any decision as to the date of her retirement."**
33. At the end of his testimony, in answer to a question put to him by the Court as to whether there was an agreement that the Employee would retire specifically with effect from August 31, 2014, Mr. Small, like Mr. Warner, said that there was no such agreement.

Resolving Issue No. 1:

Whether the Employee agreed that she would go on retirement from August 31, 2014

34. In our view the resolution of this issue is straightforward. Notwithstanding the Employee's expressions regarding her feeling that it was time to retire, it is clear from the evidence of both Mr. Warner and Mr. Small that at the meeting held on July 3, 2014 the parties did not agree that the Employee would go on retirement from August 31, 2014.
35. In that regard, contrary to contention of the Employer at paragraph 12 of its Memorandum, the Employer's letter dated August 27, 2014 was no mere farewell letter to the Employee written out of courtesy. As we understand the letter, it conveys the Employer's confirmation of the essential and certain terms of an agreement purportedly made at the meeting on July 3, 2014. The expressions of gratitude and so on in the second and third paragraphs of the letter are secondary.
36. In our view, the real significance of the letter is that it purported to formalize an agreement with three (3) components, namely:
- (a) that the Employee would retire.
 - (b) the retirement would take effect from August 31, 2014.
 - (c) that there was in fact an agreement in respect of (a) and (b).
37. Based on our analysis of the evidence, it is clear that the Employer took advantage of the Employee's earlier contemplations and open expressions regarding her retirement. The Employer used those contemplations and open expressions to determine not only that it was time for the Employee to retire but also that her retirement would take effect from August 31, 2014. In that regard, it appears to us, as Mr. Small testified, that the Employee had no choice in the matter. It was not open to her to determine on her own and convey to the Employer precisely when she wished to retire and on what terms.
38. In the circumstances, the Employer's lack of a mandatory retirement age and/or a retirement policy and/or set of procedures, guidelines and requirements for retirement are fatal. Such considerations are critical given the Employer's then on-going practice of employing teachers who were already over sixty (60) years old, who had previously retired for the Government's teaching service and allowing at least one of them to continue in her employment up to the age of eighty (80) years.
39. In any event, there was no existing requirement for either party to give a minimum period of formal notice or meet any other criteria as prerequisites for

retirement. The Employer is wholly blameworthy in the circumstances for those omissions.

40. In the final analysis, we resolve this issue in favour of the Employee. There was no agreement that she would retire on August 31, 2014 or at all.

Issue No. 2

Whether the Employee was Unfairly Dismissed

41. **In Reference No. 3 of 1999 St. Lawrence de Freitas v E. Alex Benjamin Limited** this Court considered a case where the employee's employment was terminated with three (3) months' notice after the employer imposed a compulsory retirement age of 60. It was held that the Employee had been unfairly dismissed and he was awarded substantial compensation therefor.
42. **In Civil Appeal No. 12 of 2002 E. Alex Benjamin Ltd. v St. Lawrence de Freitas**, the employer appealed the decision of this Court. The Court of Appeal, in a landmark decision, avoided the issue of unfair dismissal, quashed the decision of this Court and found that the Employee "had been retired in the circumstances where it was obligatory for his employers to first given him reasonable notice." The Court then fixed a period of twelve (12) months as reasonable notice having regard to the Employee's age, and his nine (9) years of service. In the end the Court of Appeal ordered that the Employee be paid the equivalent of twelve (12) months' salary, less the ex gratia payment previously made by the Employer to him.
43. Naturally, this Court will follow the said decision of the Court of Appeal. As a result, the issue of unfair dismissal as raised in this Reference cannot be sustained.

Issue No.3

Whether the Employee received reasonable notice of the Employer's desire for her to retire on August 31, 2014.

44. The **de Freitas** case was applied in **Reference No. 5 of 2010: Theresa Gregory v St. John's Co-operative Credit Union Ltd.** In the latter case, the employee, the Manager of the employer's business for twelve (12) years, complained that the employer did not inform her in writing about its retirement policy. In particular, although the employee had repeatedly raised the issue of the employer's lack of a retirement age policy, no effective date of retirement was stated until November 27, 2006 when the employee was formally advised for the first time that she would be required to retire on December 18, 2006. This Court held that such notification did not constitute reasonable notice.

45. Having regard to the employee's position and tenure, this Court held that the appropriate period of notice was twelve (12) months and ordered that she be paid the equivalent of twelve (12) months' salary in lieu of notice. In addition, this Court identified exceptional reasons and awarded costs of \$7,000.00.
46. In light of the binding decision of the Court of Appeal in the **St. Lawrence de Freitas case** and its unchallenged application in the **Theresa Gregory case** we are constrained to determine this case accordingly.
47. We have determined that there was no agreement between the Employee and the Employer for the Employee's retirement on August 31, 2014. The significance of the precise date at which the retirement would take effect cannot be overstated.
48. Moreover, and perhaps more fundamentally, the Employer's failure or refusal to formally communicate with the Employee regarding its retirement policy generally, its decision to retire the Employee on August 31, 2014 and the provision of reasonable notice thereof all bring the Employee's position in this Reference squarely within the ambit of the **de Freitas** and **Gordon cases**.
49. In the circumstances, we conclude that the unfortunate state of affairs culminating with the Employer's letter dated August 27, 2014 misguidedly stating that the parties had agreed to the Employee's retirement on August 31, 2014, was entirely due to the Employer's failure to act reasonably.
50. We find that at the meeting held on July 3, 2014 the Employer informed the Employee for the first time of its decision/requirement that she should retire. The Employer's decision that the Employee was required to retire on August 31, 2014 was made at the earliest at that meeting. In any event, the decision requiring her to retire on August 31, 2014 was never communicated to the Employee until she received the letter dated August 27, 2014. In that regard, we agree with the Employee that she received on three (3) days' notice of her termination.

Issue No. 4

Whether the Employee is entitled to compensation for the termination of her services on the ground of retirement without reasonable notice.

51. In the final analysis we find the Employee received no reasonable notice. We fix the reasonable notice to which she was entitled at twelve (12) months.

52. For the reasons stated above, we hold that the Employee is entitled to compensation, in lieu of reasonable notice. **In that regard, we award the equivalent to twelve (12) months' pay in the sum of \$36,000.00.**

Exemplary Damages

53. Quite apart from compensation in lieu of reasonable notice, we are of the view that the conduct of the Employer attract exemplary damages. We are of the opinion that the Employee's services were terminated in circumstances that were harsh, oppressive and otherwise not in accordance with the principles of good industrial relations practice. In that regard, we find it useful to highlight the following:

54. The Employer had over five (5) years, more than ample time, to address the obviously unsatisfactory state of affairs. In terms of reasonableness, the Employer's conduct left much to be desired in the particular circumstances of this case. The following circumstances cannot be over-emphasized.

- The Employee commenced her employment with the Employer at or after she had attained the age of sixty (60) years.
- Teachers, like the Employee, were permitted to teach at the Employer's school up to varying ages, including up to age 80.
- After ten (10) years of Service, five (5) years before her retirement when she was approximately seventy (70) years old, the Employee was given the option to retire with an ex gratia payment of \$10,000.00 or continue her employment in the Employer's Pre-School Division.
- Over the period of five (5) years after she was given the option to retire in 2009, the Employee, from time to time, orally expressed her feeling to the Principal that perhaps the time had come for her to retire.
- During the said period of five (5) years up to 2014, the Employer had concerns about the Employee's performance and/or conduct and/or health to the extent that it wrote to the Employee on at least four (4) occasions expressing its concerns.
- Notwithstanding the Employee's repeated expressions regarding her retirement, the option offered in 2009, the several complaints, her obvious advanced age, the Employer did nothing to
 - (a) formalize and communicate its policy regarding retirement;
 - (b) set procedures which the Employee would be obliged to follow
 - (c) fix the period of notice the Employee would be required to give if she intended to retire at a certain date.
 - (d) fix and communicate to the Employee in advance a date certain at which she would be required to retire.
 - (e) give the Employee reasonable notice of its intention to retire her on a date

certain.

55. On the facts of this case, **we award exemplary damages in the sum of \$6,000.00** the equivalent of two (2) months' salary.

Costs

56. Again, based on the specific facts of this case we are of the opinion that there are sufficient exceptional reasons to justify an award of costs. Not least among those reasons is the Employer's misrepresentation in the termination letter that there was an agreement that the Employee should retire on August 31, 2014.
57. We are mindful of the award of Costs in the **Gordon case**. However, in this case we award costs in the sum of \$4,000.00.

Order

58. We order as follows:

- (1) The Employer shall pay the following sums to the Employee in respect of the Employer's requirement that she retire on July 31, 2014 without reasonable notice:
- | | |
|--|--------------------|
| (a) Payment in lieu of reasonable notice | \$36,000.00 |
| (b) Exemplary Damages | \$ 6,000.00 |
| (c) Costs | <u>\$ 4,000.00</u> |
| | <u>\$46,000.00</u> |
- (2) The Employer shall pay the said total sum of \$46,000.00 to the Employee no later than November 30, 2016.

Dated 21st October, 2016



Charlesworth O.D. Brown
President



St. Lawrence de Freitas
Member

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